No. 14-400

In The
Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT MARY K. VIEGELAHN IN OPPOSITION

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QUESTION PRESENTED

Section 1326(a)(2) of Title 11 of the United States Code, provides that payments made by the debtor to the trustee pursuant to a proposed plan shall be retained by the trustee until confirmation or denial of confirmation. Specifically: "If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable." Section 1327(a) of Title 11 binds the debtor and each creditor as to each provision of the confirmed plan. If a Chapter 13 case is converted to another chapter, 11 U.S.C. § 348(e) in theory terminates the service of a Chapter 13 Trustee as to the duties defined in the bankruptcy code, however, the trustee must "wind up" the post conversion administration of the confirmed plan, including but not limited to, the distribution to creditors, or in some instances, to the debtor, of those monies transmitted by the debtor prior to conversion. Unlike *In re Michael*, 699 F.3d 305 (3d Cir. 2012) ("*Michael II*"), the property (including wages voluntarily transmitted to the trustee) did not revest in Petition, Charles E. Harris, III (Debtor) at confirmation but remained vested in the estate pursuant to the plan and order confirming plan.

Chapter 13 of Title 11 is not intended to create a savings account while a debtor contemplates conversion to another chapter. A debtor in Chapter 13 receives the benefit of the automatic stay and for a debtor to have an expectation of retaining funds voluntarily transmitted to a trustee post-confirmation

QUESTION PRESENTED – Continued

but prior to conversion creates a windfall not intended by the Code. Both the statutory provisions of Title 11 and equity dictate that upon conversion to another chapter a debtor should not be permitted to demand return of undistributed, voluntary payments made for the benefit of creditors pursuant to the plan proposed by the debtor and confirmed by the court. It is the Chapter 13 Trustee that is best suited to "wind up" the administration of the confirmed Chapter 13 plan.

The question presented is as follows:

Whether the Trustee is required to return to a debtor funds voluntarily transmitted pursuant to a confirmed plan and in the possession of the Trustee at the time the debtor elects to convert the case to a Chapter 7 or whether the trustee should, in the process of winding up the case, distribute such funds to creditors pursuant to the plan.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	iii
Table of Authorities	v
Statutory Provisions Involved	1
Introduction	2
Statement of the Case	2
1. Factual Background	2
2. Procedural History	4
Reasons for Denying the Petition	5
I. The Court Should Deny The Petition As Interlocutory	5
II. The Decision Below Neither Created Nor Adds To A Federal Circuit Split Requiring This Court's Review	6
III. The Fifth Circuit's Decision Is Sound And Well-Reasoned	13
A. Section 348(f) does not terminate a Chapter 13 Trustee's responsibility to distribute funds in her possession to creditors	13
B. Section 348(e) does not establish who, between Petitioner and his creditors, has the better claim to monies in possession of a Chapter 13 Trustee at time of conversion	15

TABLE OF CONTENTS – Continued

Page

C. Petitioner does not have a greater right to undistributed funds in the possession of the Trustee than his creditors pursuant to 11 U.S.C. § 1327 18

D. A debtor in bankruptcy would not be deterred from filing Chapter 13 if payments made under a plan would not be returned to the debtor if he or she chooses to convert to Chapter 7; and to hold otherwise may encourage abuse 21

Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co., 389 U.S. 327, 88 S.Ct. 437 (1967) 6

Brown v. Texas, 522 U.S. 940, 118 S.Ct. 355 (1997) 12

Clark v. Viegelahn, No. SA-12-CA-979, Dkt. No. 7 (W.D. Tex. July 9, 2013) 20

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 36 S.Ct. 269 (1916) 6

Hamilton v. Lanning, 560 U.S. 505, 130 S.Ct. 2464 (2010) 23

In re Bell, 248 B.R. 236 (Bankr. W.D.N.Y. 2000) 22

In re Clark, No. 10-51352, Dkt. No. 84 (Bankr. W.D. Tex. Aug. 2, 2012) 20

In re Hamilton, 493 B.R. 31 (Bankr. M.D. Tenn. 2013) 20

In re Hardin, 200 B.R. 312 (Bankr. E.D. Ky. 1996) 14

In re Harris, 757 F.3d 468 (5th Cir. 2014) 2

In re Hufford, 460 B.R. 172 (Bankr. N.D. Ohio 2011) 21

In re Lennon, 65 B.R. 130 (Bankr. N.D. Ga. 1986) 10

In re Michael, 699 F.3d 305 (3d Cir. 2012) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

In re O'Quinn, 143 B.R. 408 (Bankr. S.D. Miss. 1992) 24, 25

In re Parrish, 275 B.R. 424 (Bankr. D.D.C. 2002) 15, 16

In re Pegues, 266 B.R. 328 (Bankr. D. Md. 2001) 16

In re Redick, 81 B.R. 881 (Bankr. E.D. Mich. 1987) 16

In re Weise, 552 F.3d 584 (7th Cir. 2009) 21

McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438 (1983) 12

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S.Ct. 716 (2011) 23

Virginia Military Institute v. U.S., 508 U.S. 946, 113 S.Ct. 2431 (1993) 6

STATUTES AND RULES

11 U.S.C. § 348 ..... 15, 16

11 U.S.C. § 348(e) 15

11 U.S.C. § 348(f) 13, 14

11 U.S.C. § 348(f)(2) 13

11 U.S.C. § 349 20

11 U.S.C. § 349(b) 20

11 U.S.C. § 349(b)(3) 20

11 U.S.C. § 1306(b) 1, 19

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 1326(a)(2) 1, 19

11 U.S.C. § 1327 ..... 8, 18

11 U.S.C. § 1327(a) 1

11 U.S.C. § 1327(b) 8, 9, 12, 18, 19

11 U.S.C. § 1327(c) 8

Fed. R. Bankr. P. 1019 16

Sup. Ct. R. 10 7

Sup. Ct. R. 11 5

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioner, the following provisions are also relevant: 11 U.S.C. §§ 1306(b); 1326(a)(2); and 1327(a).

In pertinent part, 11 U.S.C. § 1306(b) provides:

> Except as provided in a confirmed plan or order confirming plan, the debtor shall remain in possession of all property of the estate.

In pertinent part, 11 U.S.C. § 1326(a)(2) provides:

> A payment made under paragraph (1)(a) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors.

In pertinent part, 11 U.S.C. § 1327(a) provides:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

INTRODUCTION

Respondent, Mary K. Viegelahn (Chapter 13 Bankruptcy Trustee), respectfully submits that none of Petitioner's arguments merit further review. The decision below correctly followed equitable doctrines of the Court. Although the Fifth Circuit acknowledged that the issue before the Court has "divided courts for thirty years," only two circuit courts have addressed this issue. Pet. App. 2a. Petitioner asserts that "this Court's guidance is needed to resolve that split and to provide uniformity in the administration of the Nation's bankruptcy laws." Pet. 4. However, Petitioner has omitted an important factual distinction between the two circuit decisions, which after consideration will support a denial of the Petition for a Writ of Certiorari. In the Third Circuit, the property of the estate revested in the debtor at confirmation of the plan. *In re Michael*, 699 F.3d 305 (3d Cir. 2012) ("*Michael II*"). By contrast, in the instant case, the property remained vested in the estate at confirmation of the plan pursuant to the plan and order confirming plan. *In re Harris*, 757 F.3d 468 (5th Cir. 2014).

STATEMENT OF THE CASE

1. Factual Background

Petitioner, Charles E. Harris, III (Debtor), filed his voluntary petition, Case No. 10-50655, for Chapter 13 relief on February 24, 2010. Pet. App. 3a. His

plan of reorganization, confirmed on April 15, 2010 by the United States Bankruptcy Court for the Western District of Texas – San Antonio Division, provided for sixty (60) payments of $530.00 per month to the Respondent, the Chapter 13 bankruptcy Trustee, with a dividend to unsecured creditors of 100%. *Id.* The confirmed plan paid a fee to the Chapter 13 Trustee, attorney fees of $3,000.00, pre-petition mortgage arrears to Chase Home Finance, $900.00 to Conns Creditor Corporation for a television, and surrendered a 2005 Nissan Altima to Wells Fargo Dealer Services. Pet. App. 3a-4a. Per the confirmed plan, all property of the estate did not re-vest in the Debtor, but remained property of the estate. Pet. App. 21a, n. 8.

During the pendency of the case, because the Debtor failed to make direct post-petition mortgage payments to Chase Home Finance (a secured creditor), the automatic stay was terminated in order for Chase to pursue its in rem relief against Debtor's residence. Pet. App. 4a. Debtor did not amend his plan of reorganization after the termination of the automatic stay. The Debtor continued to make payments to the Trustee pursuant to the terms of the confirmed plan for more than one year after the stay was terminated. *Id.* The payments were pursuant to a voluntary pay order. A portion of the payments made by the Debtor accumulated in the Trustee's account originally designated for the mortgage lender, Chase Home Finance, under the confirmed plan. The Trustee placed a hold on these funds received by the Debtor

for Chase Home Finance in order for said creditor to not receive any monies as a result of its termination of the automatic stay. *Id.*

On November 21, 2011, the Debtor filed a Notice to Convert Case to Chapter 7. *Id.* The Trustee had in her possession $5,519.22 when the Debtor converted his case to Chapter 7. The Trustee disbursed a portion of the $5,519.22 to Debtor's counsel for legal fees in the amount of $1,200.00 on November 22, 2011 and the balance of $4,319.22 was disbursed to other creditors on December 1, 2011. The distribution of these funds constituted the only payment to unsecured creditors with allowed claims. This distribution paid unsecured creditors with allowed claims 26.26% of their claim amount as opposed to the 100% dividend proposed by the Debtor's confirmed plan. Nonpayment of these funds would result in a 0% dividend to unsecured creditors with allowed claims.

On December 29, 2011, the Debtor filed a Motion to Compel Return of Funds against the Trustee demanding a turnover of funds not distributed to creditors as of the date of conversion. Pet. App. 5a. The Trustee opposed Debtor's motion and a hearing was held. The Bankruptcy Court granted Debtor's motion and entered an Order Compelling Return of Funds. *Id.*

2. Procedural History

The Trustee appealed the decision of the Bankruptcy Court to the United States District Court for

the Western District of Texas. The District Court on March 22, 2013, relying on the Third Circuit's decision in *In re Michael*, 699 F.3d 305 (3d Cir. 2012), affirmed the decision of the Bankruptcy Court. *Id.* The Trustee appealed the District Court's decision to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed the District Court's decision and remanded for further proceedings consistent with its opinion issued on July 7, 2014. Pet. App. 28a.

REASONS FOR DENYING THE PETITION

I. The Court Should Deny The Petition As Interlocutory.

In the case at bar, the Fifth Circuit Court of Appeals issued its opinion on July 7, 2014 and ordered that the judgment of the District Court is reversed and that the cause be remanded to the District Court for further proceedings in accordance with its opinion. Pet. App. 28a.

Because the Fifth Circuit remanded this case to the District Court for findings not inconsistent with its decision, certiorari is appropriate if this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

In accordance with this Court's precedent, "because the Court of Appeals remanded the case, it is

not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437 (1967); *Virginia Military Institute v. U.S.*, 508 U.S. 946, 113 S.Ct. 2431 (1993) (opinion of Justice Scalia noting that this Court generally awaits a final judgment before granting a petition for certiorari).

Review is not necessary because nothing in the circuit court's decision requires immediate determination; and does not involve a matter of great national significance. Certiorari is a jurisdiction that should be exercised in extraordinary circumstances. Delaying this Court's intervention until a final decision in the lower court has been entered would best serve judicial economy. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S.Ct. 269 (1916) ("As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree.").

II. The Decision Below Neither Creates Nor Adds To A Federal Circuit Split Requiring This Court's Review.

Review of a writ of certiorari is granted for compelling reasons, including, but not limited to, a United States court of appeals has entered a decision in conflict with the decision of another United States

court of appeals on the same important matter. Sup. Ct. R. 10.

Petitioner requests this Court grant certiorari to resolve a supposed conflict in the circuit courts. Pet. 10. Petitioner asserts that the Fifth Circuit's answer to the question of whether undistributed funds held by a Chapter 13 Trustee at time of conversion should be refunded to the debtor or disbursed to creditors is in direct conflict with the Third Circuit; and that it deepens the division of decisions of bankruptcy courts. Pet. 10.[1] However, the Third Circuit, despite being the only other circuit to address the issue of a Chapter 13 Trustee's right to disburse undistributed funds in his or her possession, rendered its decision with a confirmed plan wherein title to the debtor's property revested in the debtor on confirmation of the plan. *Michael II*, 699 F.3d at 309-310. Whereas, the same question decided by the Fifth Circuit involved a confirmed plan that specifically provided upon confirmation of the plan, all property of the estate shall not vest in the debtor, but shall remain property of the estate.

Petitioner asserts that "[t]he Third Circuit, presented with *nearly* identical facts in a case two years ago, reached the opposite conclusion from that reached by the court of appeals below." Pet. 10. Petitioner's use of the term "nearly" concedes that the

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[1] The Fifth Circuit acknowledges the question has divided courts for thirty years; and that only one other court of appeals has answered it. Pet. App. 2a-3a.

facts in *Michael II*, are almost, but not quite the same as the facts in the court of appeals' decision below. Indeed, Petitioner's characterization of a conflict in the circuit courts is misplaced. As stated, *supra*, the two circuit courts dealt with a fact significantly different as it relates to vesting of property of the estate. Respondent posits that Petitioner's arguments concerning the alleged importance of the question presented support a denial of certiorari. In sum, there is no circuit split.

The Third Circuit, in an opinion by Judge Ambro, relying heavily on 11 U.S.C. § 1327(b), held that a debtor in bankruptcy has a greater right to undistributed funds in the possession of the trustee than his creditors. *Michael II,* 699 F.3d at 313.

> In pertinent part, 11 U.S.C. § 1327 provides:
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Judge Ambro in *Michael II* explained:

> [P]roperty comes into and flows out of the estate. In the context of a Chapter 13 case, § 1327(b) vests all property of the Chapter 13

> estate in the debtor on confirmation of the plan. Thus when the debtor transfers funds to the Chapter 13 trustee to fulfill its obligations under a confirmed plan . . . the funds become part of the estate, and the debtor retains a vested interest in them. Though creditors have a right to those payments based on the confirmed plan, the debtor does not lose his vested interest until the trustee affirmatively transfers the funds to creditors.

Michael II, 699 F.3d at 313.

As so aptly noted by the court of appeals below, the decision of the Third Circuit ignored the exception of 11 U.S.C. § 1327(b), which is prefaced by the clause "except as otherwise provided in the plan or the order confirming plan." Pet. App. 19a.

In this case, the plan and the order confirming Debtor's plan is clear that all property of the Chapter 13 estate, including any income, earnings, or other property which may become part of the estate during the administration of the case, shall not revest in the debtor. Therefore, funds voluntarily paid by the Debtor (even from wages) until the point of conversion belong to the Chapter 13 estate and should be disbursed to the party with the greatest claim to them – Debtor's creditors.[2] It is only those funds paid

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[2] The Fifth Circuit acknowledged in footnote 8 of its opinion that the Respondent attempted to distinguish *Michael II* from the current case but noted that the order confirming the plan also stated the "property as may revest in the debtor shall so revest only upon further Order of the Court or upon dismissal,

(Continued on following page)

by a debtor post-conversion of his or her Chapter 13 case to Chapter 7 that should revert back to the debtor.

Further, and as explained by the court of appeals below:

> If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of these payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest he may have in the payments made to the trustee.

Pet. App. 19a-20a.

The court of appeals quoting in *In re Lennon*, 65 B.R. 130, 136 (Bankr. N.D. Ga. 1986) noted:

> [T]he debtor is bound to make the specified payment provided in the confirmed plan. These payments are specifically earmarked and set aside for distribution to creditors provided for by the confirmed plan. To the extent that the confirmed plan provides for payment from debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is

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conversion, or discharge." Pet. App. 21a, n. 8. However, the Fifth Circuit found "it unnecessary to define with precision the property that 'may revest in the Debtor.' By requiring Harris to pay part of his wages to the trustee for distribution to creditors, the [confirmation] order clearly did not contemplate that such payments would revest in Harris." *Ibid.*

> not entitled to possession nor is the debtor vested with title to such payments. . . . [D]ebtor is to have no continuing interest in payments actually made pursuant to a confirmed plan.

Pet. App. 20a.

Because the two circuit courts that have addressed the issue dealt with a key fact significantly different in regard to property of the estate at confirmation and whether said property vests or does not vest with a debtor, the petition should be denied.

The alleged split between the Third and Fifth Circuits is superficial at best, and review by this Court at this time would be premature. Further, any reference that the issue has divided bankruptcy courts and district courts for "thirty years,"[3] is not sufficient for this Court to grant certiorari review. The infrequency of decisions issued by lower courts is worth consideration. The Fifth Circuit cited only twelve (12) cases dating from 1986 through 2001 for the majority position, which held funds should be distributed to creditors; and eight (8) cases dating from 1982 through 2010 for the minority position, which hold that funds should be distributed to a debtor. Pet. App. 2a, n. 1. In addition, the Fifth Circuit noted in its analysis of the minority position that: "[M]any of the earlier opinions in the latter category, after determining that the funds do not become part

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[3] Pet. App. 2a.

of the new Chapter 7 estate, did not go on to consider whether creditors may nonetheless be entitled to them under the old Chapter 13 plan." *Id.*

Denial of certiorari would allow time for full debate and consideration of other circuit courts. "[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'" *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 355, 357 (1997) (citing *McCray v. New York*, 461 U.S. 961, 962-963, 103 S.Ct. 2438, 2439 (1983)). Thus, without debate among the circuits, review at this time by the Court would be done without benefit of the circuits.

As stated, *supra*, the Fifth Circuit's decision is factually distinct from the Third Circuit. Contrary to Petitioner's description of a substantive circuit split, the Fifth Circuit is the only circuit to have analyzed the question within the scope of the exception to the general rule of 11 U.S.C. § 1327(b). The Fifth Circuit's interpretation is the only sensible construction considering the requisite facts.

Therefore, the arguments of Petitioner concerning the question presented support denial of certiorari in order to allow further consideration and debate amongst the circuit courts. An intolerable conflict is not created by the opinion issued by the court of appeals below.

III. The Fifth Circuit's Decision Is Sound And Well-Reasoned.

Petitioner asserts that the decision below is erroneous. Pet. 19. The Respondent respectfully disagrees. There is no error to correct. The Fifth Circuit's opinion is well reasoned and interprets the United States Bankruptcy Code in a logical fashion given the language of the Code, the context of the particular provisions at play, and congressional intent.

A. Section 348(f) does not terminate a Chapter 13 Trustee's responsibility to distribute funds in her possession to creditors.

Petitioner argues that returning undistributed funds in possession of the Trustee transmitted by the Debtor post-confirmation, but prior to conversion, follows the text of 11 U.S.C. § 348(f), which provides that unless a case is converted in bad faith from Chapter 13 to another chapter, property of the estate consists of property as of the date of the filing of the petition. Pet. 19. If converted in bad faith, property of the estate consists of property at time of conversion. 11 U.S.C. § 348(f)(2).

Prior to 1994, bankruptcy court decisions evidenced a split in authority as to the issue of whether or not the Chapter 7 Trustee is entitled to funds in the hands of the Chapter 13 Trustee in post confirmation conversion to Chapter 7 cases. Congress attempted to resolve this split of court decisions in 1994

by amending § 348(f) of the United States Bankruptcy Code. Pet. App. 6a-7a.

It is asserted by Petitioner that, as a result of the amendment to § 348(f), "the Chapter 13 estate that includes debtors' post petition wages terminates upon conversion, and the resulting Chapter 7 estate does not include those wages." Pet. 20. Petitioner further asserts that it would be illogical to conclude that funds not included in a Chapter 7 estate could still be disbursed to a debtor's creditors. *Id.*

"After the passage of § 348(f), it is clear that property acquired after the filing of a Chapter 13 petition, including wages, does not become part of the Chapter 7 estate upon conversion (absent bad faith)." However, and despite the amendment to 11 U.S.C. § 348(f), there still remains the question as to the proper disposition of money received by the Chapter 13 Trustee prior to and in the possession of the Chapter 13 Trustee as of the date of conversion of the case to a proceeding under Chapter 7. *Ibid. See also In re Hardin,* 200 B.R. 312, 313 (Bankr. E.D. Ky. 1996) (The Bankruptcy Court observed that while Congress clarified the disposition of funds between the Chapter 7 estate and the debtor in the 1994 amendments to the Bankruptcy Code, Congress did not directly address the rights that creditors in a Chapter 13 case have in funds provided through plan payments to a Chapter 13 Trustee that are still in the possession of the trustee when conversion of the case occurs post-confirmation.).

Respondent asserts it is not illogical or otherwise absurd to conclude that a debtor's wages could still be paid to creditors even if not part of a Chapter 7 estate upon conversion.

The court of appeals correctly noted the fact that the Chapter 13 Trustee does not retain control over assets in a converted Chapter 7 estate does not mean the Trustee loses control over assets outside of the Chapter 7 estate. Pet. App. 11a. "Even after termination of her services [Respondent] still has a responsibility to distribute remaining funds in her possession to the parties with the best claim to them." *Id.* Clearly, the court of appeals implies that the Trustee has a duty to "wind up" the administration of the confirmed plan post conversion, including a final distribution of funds on hand to creditors at time of conversion. Moreover, nothing in 11 U.S.C. § 348(e) establishes who, between Petitioner and his creditors, has the better claim to the monies in possession of the Trustee at time of conversion. *Id.*

B. Section 348(e) does not establish who, between Petitioner and his creditors, has the better claim to monies in possession of a Chapter 13 Trustee at time of conversion.

Respondent posits that 11 U.S.C. § 348(e), which terminates a trustee's services upon conversion, cannot be taken too literally. *See In re Parrish,* 275 B.R. 424, 430 (Bankr. D.D.C. 2002) (The Bankruptcy Court observed that § 348 is aimed at the practicality

that there cannot be two trustees administering the same estate and it should be interpreted narrowly thereby restricting it to the practical purposes it serves because Congress could not have intended termination of the Chapter 13 Trustee's services to clean up and finalize the administration of the Chapter 13 case.); *In re Redick,* 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987) (noting that it is not true that the Chapter 13 Trustee ceases to be a Chapter 13 Trustee because then the Chapter 13 Trustee would not have a duty to render a final account pursuant to Fed. R. Bankr. P. 1019). *Accord, In re Pegues,* 266 B.R. 328, 336-337 (Bankr. D. Md. 2001) ("[I]t is clear that Congress intended that the chapter 13 trustee shall wind up the affairs of the chapter 13 estate including disbursing monies on hand to the appropriate recipient."). As noted by the Court in *In re Parrish, supra,* it is not the Chapter 7 Trustee that has a duty to disburse monies under the confirmed plan. As such, § 348 does not relieve the Chapter 13 Trustee of disbursing pre conversion monies paid by the Debtor and received by the Trustee to creditors. *In re Parrish,* 275 B.R. at 431. The court of appeals, quoting *In re Parrish*, 275 B.R. at 430 and *In re Redick*, 81 B.R. at 886, correctly stated that because the Trustee is holding funds belonging to another, she is in some sense still a trustee even if services were terminated. Pet. App. 10a.

Further, per the court of appeals, "it is clear that after conversion, the debtor's continuing obligation under the plan . . . cease; [h]owever it does not follow that the plan should thereafter be considered

retroactively undone in full, and no statutory authority supports such an interpretation." Pet. App. 13a.

As explained by the court of appeals below:

> [C]onversion does not eliminate the trustee's power and duty to wrap up certain affairs of the estate. Similarly, there is no reason why prospective termination of the plan necessarily prohibits the trustee from distributing the funds remaining in her possession – which were paid at a time when the plan *was* still in force, and the debtor was still obligated to make payments – pursuant to the plan.

Pet. App. 14a.

As further explained by the court below, quoting Judge Roth in his dissent in *Michael II*:

> [S]ince Congress intended for the trustee to perform several ancillary duties to clean-up and finalize the administration of the estate, . . . there is no logical reason why distribution of funds pursuant to the previously confirmed reorganization plan cannot be included as one of those administrative duties.

Pet. App. 11a.

It is not as Petitioner suggests that the Trustee's services are limited to a single ancillary duty to render a final report and account. Pet. 22. The Trustee's duties in "winding up" post conversion administration of the confirmed plan also include a final distribution to creditors of the funds voluntarily paid

by the Debtor.[4] Petitioner should have no expectation that monies paid to the Trustee would be returned to him simply because he chose to convert his case.

C. Petitioner does not have a greater right to undistributed funds in the possession of the Trustee than his creditors pursuant to 11 U.S.C. § 1327.

The Petitioner's reading of 11 U.S.C. § 1327 and *Michael II*'s interpretation of 11 U.S.C. § 1327; and argument of the Petitioner that the presumption in Chapter 13 is that he continues to maintain possession of property of the estate and his alleged vested interest in property of the estate, as it pertains to the facts in this case, is incorrect. *See* Pet. 23 and *Michael II*, 699 F.3d at 313. The Respondent asserts that the court of appeals below was correct in its analysis of 11 U.S.C. § 1327(b).

> If the plan requires the debtor to make payments to the trustee that will be distributed to creditors, the debtor certainly does not retain possession of these payments. Likewise, it would seem that the confirmation order specifically divests the debtor of any interest

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[4] Petitioner repeatedly refers to payments to the Trustee as a garnishment. The Petitioner's wages were not "garnished" in the sense of a seizure. It is the Petitioner, who, at the inception of his bankruptcy case, proposed a pay order be instituted to ensure that the voluntary payments proposed in his plan would, in fact, be paid.

> he may have in the payments made to the trustee.

Pet. App. 19a-20a.

As asserted by Respondent, and acknowledged by the Fifth Circuit, funds voluntarily paid by the Debtor prior to conversion for distribution pursuant to the confirmed plan were intended for the benefit of creditors and should be disbursed to the party with the greatest claim to them – creditors. These funds did not re-vest in the Debtor at time of confirmation. Pet. App. 21a. Any presumption that the Debtor continues to "possess" wages that he voluntarily relinquished for distribution to his creditors prior to conversion and pursuant to a confirmed plan is incorrect.[5]

Petitioner's reading that 11 U.S.C. § 1327(b), and as interpreted by *Michael II*, "is consistent with other provisions of the Bankruptcy Code that require the trustee to return funds to the debtor under other circumstances" is misplaced. Pet. 23.

First, 11 U.S.C. § 1326(a)(2) requires a trustee to retain a plan payment until confirmation or denial of confirmation. The circumstance Petitioner refers to is: if a plan is not confirmed, the trustee shall return the payment to debtor. That is not the case here. Petitioner's plan was confirmed.

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[5] *See* 11 U.S.C. § 1306(b).

Second, Petitioner ignores the clear exception to 11 U.S.C. § 349(b)(3).[6] Pet. 23-24. Petitioner incorrectly asserts, that if he had moved to dismiss his case pursuant to 11 U.S.C. § 349 as opposed to converting to Chapter 7, "there is no dispute that respondent would have refunded any undistributed funds to him under Section 349(b)(3)." Pet. 24. Petitioner's argument is erroneous.

Respondent would have "in the event of a dismissal," as she has in the past before the Bankruptcy Court,and on appeal, argued that funds in her possession at time of dismissal should be distributed to creditors as opposed to the Debtor.[7] A bankruptcy court has discretion to alter the presumptive revesting of property to a debtor upon dismissal of a case. *See* 11 U.S.C. § 349(b)(3). *See also In re Hamilton*, 493 B.R. 31, 44-46 (Bankr. M.D. Tenn. 2013) (The Bankruptcy Court noted because § 349(b) is prefaced with the phrase "unless the court, for cause, orders otherwise" bankruptcy courts have discretion to order that undistributed funds on hand with a trustee at time of dismissal do not revest in a debtor and that a debtor's creditors may have both a statutory and

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[6] 11 U.S.C. § 349(b)(3) provides that *unless the court, for cause orders otherwise*, a dismissal of a Chapter 13 case revest the property of the estate in the entity in which such property was vested immediately before the commencement of the case (emphasis added).

[7] *Clark v. Viegelahn*, No. SA-12-CA-979, Dkt. No. 7 (W.D. Tex. July 9, 2013); *In re Clark*, No. 10-51352, Dkt. No. 84 (Bankr. W.D. Tex. Aug. 2, 2012).

equitable basis for receiving said funds.); *In re Wiese*, 552 F.3d 584, 589-592 (7th Cir. 2009) (The Circuit Court held in a Chapter 12 case, the bankruptcy court's decision that there was cause for a confirmed plan to remain binding was within its discretion, e.g., reliance of the parties on the terms of the plan and interest of the creditors.); *In re Hufford*, 460 B.R. 172, 178 (Bankr. N.D. Ohio 2011) (In a case where debtor's confirmed plan required any funds in trustee's possession at time of dismissal be distributed to creditors, the Bankruptcy Court found that cause existed because debtors received the benefits of the bankruptcy code for an extended period of time and debtors should have expected that payments made while their bankruptcy case was pending should be allocated to their creditors pursuant to the terms of their plan.). Cause could exist for an outcome other than returning funds in the hands of the Trustee to a debtor in a dismissed case.

D. A debtor in bankruptcy would not be deterred from filing Chapter 13 if payments made under a plan would not be returned to the debtor if he or she chooses to convert to Chapter 7; and to hold otherwise may encourage abuse.

The decision below, particularly the Fifth Circuit's emphasis on considerations of policy and equity,[8] does

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[8] Pet. App. 22a-28a.

not produce a disincentive against a debtor continuing to proceed in Chapter 13 after a change in circumstances as Petitioner suggests. Pet. 24.

Petitioner further argues that the decision below provides a disincentive for attempting a repayment plan in Chapter 13 in the first place; and that debtors ought to feel confident that if a Chapter 13 case is not successful, or the goals of a debtor in a repayment plan cannot be met, that he or she can recover any undistributed payments in possession of the trustee at time of conversion. Pet. 25. To hold otherwise, as the Petitioner asserts, increases the risk that creditors will get "bonus" payments despite a conversion. *Id.* at 25-26. Petitioner fails to state that he may not have initially been eligible for a Chapter 7 proceeding as his annual income exceeded the median income and a presumption of abuse would have existed. In addition, the Petitioner's assertion that creditors will receive a "bonus" fails to consider that the creditors, secured and unsecured, have been without payment for extended periods of time.

As noted by the court of appeals, it is not likely that a debtor would be deterred by knowledge that voluntary payments made to a trustee in Chapter 13 would not be returned if a debtor chooses to convert to Chapter 7. Pet. App. 24a. Quoting *In re Bell*, 248 B.R. 236, 240 (Bankr. W.D.N.Y. 2000), the Fifth Circuit stated that such a rule "will not discourage any individuals from proceeding in Chapter 13, since it simply requires them to fully honor their obligation under a confirmed plan up to the point when they voluntarily wish to terminate the provisions of the

plan and have their case. . . . converted to a chapter 7 case." Pet. App. 24a. Any holding to the contrary would encourage debtors to convert (or dismiss) their Chapter 13 case when funds on hand with a Chapter 13 Trustee are high. Quoting the dissenting opinion in *Michael II*, 699 F.3d at 320, the court of appeals stated "if the undistributed funds revert to [the debtor], instead of being distributed to creditors in accordance with the plan's terms, [the debtor] would receive a windfall." This windfall would certainly promote abuse of the bankruptcy system.

As this Court expressed in *Hamilton v. Lanning*, 560 U.S. 505, 130 S.Ct. 2464 (2010), and *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S.Ct. 716 (2011), the Congressional intent behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was to correct the perceived abuses of the consumer bankruptcy system, for debtors to repay creditors the maximum they can afford – "to help ensure that debtors who can pay creditors do pay them." *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716, 721, 725 (2011). In other words, BAPCPA was enacted to promote the rights of creditors. Therefore, the purpose of the Bankruptcy Code is not to allow a debtor to be rewarded for failing to observe a confirmed plan at the expense of his or her creditors. Bankruptcy was designed to give debtors a fresh start and place debtors and creditors in the best financial position at the conclusion of a case.

As acknowledged in the decision below, a debtor in bankruptcy is required to act in good faith in dealing with his or her creditors in exchange for the

protection and benefits afforded to him or her as a result of the filing of a bankruptcy. Pet. App. 26a-28a. In this case, Debtor received a benefit and protection until the point of conversion; and creditors are entitled to payment of monies voluntarily paid by the Debtor during the plan in exchange for the benefit he received.

In *In re O'Quinn,* the Bankruptcy Court held that the Chapter 13 Trustee should be ordered to disburse funds according to the terms of the debtor's plan, which represented pre conversion plan payments in the trustee's possession. *In re O'Quinn,* 143 B.R. 408, 413-414 (Bankr. S.D. Miss. 1992). The *O'Quinn* Court, in balancing the competing interests of the debtors and creditors, looked to the overall purposes of the bankruptcy code and observed:

> [T]he Debtors retained possession of and continued to use certain property that was security for certain of their debts. This is typical of most chapter 13 cases. The security normally consists of such items as automobiles, homes and household goods and furnishings. The secured lenders are prohibited from taking possession of their property because the debtor has a confirmed plan which proposes to pay them each month. It appears to this Court to be patently unfair to allow a debtor to drive and depreciate an automobile, occupy a home or use household goods based on a promise to his creditors in the form of a court approved plan, and then allow the debtor to snatch away the monies

> which the trustee is holding to make the payments, but has not yet disbursed, by allowing the debtor to pick an opportune time to convert.

Id. at 413.

The court of appeals was correct in deciding that the Debtor, post conversion, should not be permitted to receive undistributed payments in the Trustee's possession after voluntarily making those payments. Debtor forfeited his rights to those monies upon payment to the Trustee. "Conversion does not retroactively alter this arrangement and undo the benefits the debtor received from the plan." Pet. App. 27a (quoting *Michael II*, 699 F.3d at 320 n. 8 (Roth, J., dissenting)). Once the Debtor voluntarily made payments to the Trustee pursuant to his obligations under the confirmed plan, he relinquished all rights in those payments.

CONCLUSION

For the foregoing reasons, review by the Court is unnecessary. Respectfully, Respondent asserts the Petition for Writ of Certiorari should be denied.

Respectfully Submitted.

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